No. 94-1546

FILED
APR 12 1995
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

In the Matter of DORIS L. SASSOWER,

Petitioner,

—against—

HON. GUY MANGANO, as Presiding Justice of the Appellate Division, Second Department, HON. MAX GALFUNT, as Special Referee, and EDWARD SUMBER and GARY CASELLA, as Chairman and Chief Counsel, respectively of the Grievance Committee for the Ninth Judicial District,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

MEMORANDUM IN OPPOSITION

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MEMORANDUM IN OPPOSITION

Petitioner, an attorney, commenced this proceeding under Article 78 of the New York Civil Practice Law and Rules (the "CPLR") seeking to prohibit further prosecution of a disciplinary proceeding against her for alleged acts of professional misconduct. By decision, order and judgment (one paper) dated September 20, 1993, the Supreme Court of the State of New York, Appellate Division, Second Department, granted respondents' motion to dismiss the petition and denied petitioner's cross-motion for summary judgment and other relief.

A. 20.[1] By order dated May 12, 1994, the New York State Court of Appeals dismissed, *sua sponte*, on jurisdictional grounds, petitioner's appeal as of right pursuant to CPLR § 5601. A. 22. Petitioner then moved in the Court of Appeals for reconsideration and for leave to appeal. By order dated September 29, 1994, the Court of Appeals denied both of those motions. A. 22.

Petitioner now seeks certiorari to determine "[w]hether New York's attorney disciplinary law [New York State Judiciary Law § 90] is unconstitutional, as written and applied." Petition for certiorari at "Questions Presented." The petition for certiorari should be denied.

The Appellate Division based its dismissal of petitioner's Article 78 proceeding exclusively upon an adequate and independent state ground unrelated to the constitutional question petitioner now raises. Applying well-settled New York law, the Appellate Division stated:

> The remedy of prohibition is available only where there is a clear legal right and, in instances where judicial authority is challenged, only when a court acts or threatens to act either without jurisdiction or in excess of its authorized powers (*see*, *Matter of Holtzman v. Goldman*, 71 N.Y.2d 564, 569 [, 528 N.Y.S.2d 21, 24 (1988)]).

A. 21.

The Appellate Division also followed clear New York law in concluding that the extraordinary remedy of prohibition does not lie where, as here, petitioner has an adequate remedy at law. *Matter of Morgenthau v. Erlbaum*, 59 N.Y.2d 143, 147 (1983). Because petitioner's jurisdictional challenge to her disciplinary proceeding could be addressed in that proceeding itself or by motion to confirm or disaffirm a referee's report, the Appellate Division correctly decided that "petitioner

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[1] References in the form "A. __" are to the appendix to the petition for certiorari.

is not entitled to the extraordinary remedy of prohibition." A. 21.

When a state court decision rests on adequate and independent state grounds, this Court does not have jurisdiction to review it. *Sochor v. Florida*, 112 S.Ct. 2114, 2119 (1992). Since the Appellate Division's decision, order and judgment is based solely on such grounds, the petition for a writ of certiorari should be denied.[2]

Dated: New York, New York
April 10, 1995

Respectfully submitted,

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of Counsel

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[2] The constitutionality of Judiciary Law § 90 as written is, in addition, an issue that the New York State courts did not address. Petitioner did not present this question in the Appellate Division, but raised it, for the first time, in the Court of Appeals. That court did not pass upon the issue, however, for its *sua sponte* dismissal of petitioner's appeal as of right was on jurisdictional grounds, not on the merits, and its denial of petitioner's subsequent motion for leave to appeal also expressed no view of, and may not be considered a decision on, the merits. *See State Communities Aid Association v. Regan*, 69 N.Y.2d 821 (1987). Accordingly, petitioner's failure properly to raise the issue in the New York courts provides an additional basis for rejecting the petition for a writ of certiorari to the extent that it seeks to review the facial constitutionality of Judiciary Law § 90. *Yee v. City of Escondido, Cal.*, 112 S. Ct. 1522, 1531 (1992).